Supreme Court, U.S.
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No. 94-1533

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In The

Supreme Court of the United States

October Term, 1994

DEBORAH L. FLOYD,

Petitioner,

v.

COLLIN COUNTY COMMUNITY COLLEGE DISTRICT, COLLIN COUNTY COMMUNITY COLLEGE, JOHN ANTHONY, COLLIN COUNTY COMMUNITY COLLECT DISTRICT BOARD OF TRUSTEES, and TRUSTEES CAREY COX, MARGARET F. REYNOLDS, GLENN W. JUSTICE, TINO TRUJILLO, SUE WILLARD OLIVER, JAMES DICKSON, E.T. BOON, J.R. (BOB) COLLINS, and GARY Z. HARRIS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does FED. R. CIV. P. 8(a)(2) as applied by this Court's recent opinion in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, ___ U.S. ___, 113 S. Ct. 1160 (1993), preclude holding a plaintiff's complaint to a "heightened pleadings standard" in an action asserted against individual defendants who may have qualified immunity from suit? The court below imposed a heightened pleading standard in conflict with decisions in other circuits and contrary to this Court's decision in *Leatherman*.

2. Does FED. R. CIV. P. 7(a) provide a procedural mechanism for avoiding this Court's decision in *Leatherman* that a "heightened pleading standard" conflicts with FED. R. CIV. P. 8(a), as proposed by the en banc court for the Fifth Circuit Court of Appeals in *Schultea v. Wood*, No. 93-2186, 1995 U.S. App. LEXIS 4673 (March 9, 1995)?

3. May a district court preclude any discovery by plaintiff until after resolution of issues regarding an individual defendant's qualified immunity?

LIST OF PARTIES

Petitioner:

Deborah L. Floyd

Attorneys for Petitioner:

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Christopher M. Weil
WEIL & PETROCCHI, P.C.

Respondents:

Collin County Community College District
Collin County Community College
John Anthony
Collin County Community College District Board of Trustees
Margaret F. Reynolds, Trustee
Glenn W. Justice, Trustee
Tino Trujillo, Trustee
Sue Willard Oliver, Trustee
James Dickson, Trustee
E.T. Boon, Trustee
J.R. (Bob) Collins, Trustee
Gary Z. Harris, Trustee

Attorney for Respondents:

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Michael R. Buchanan
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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner Deborah L. Floyd respectfully prays that a writ of certiorari issue to review the judgment and per curium opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-styled proceeding on November 1, 1994.

OPINIONS BELOW

The opinion (Appendix A) of the United States Court of Appeals for the Fifth Circuit will not be reported in any official reporter pursuant to the Fifth Circuit's Local Rule 47.5. Similarly, the January 10, 1994 Agreed Final Judgment (Appendix F) making final the Orders of April 2, 1992 (Appendix B), June 11, 1992 (Appendix C), and June 16, 1992 (Appendix D) Orders, entered by the United States District Court for the Eastern District of Texas, Sherman Division have not been designated for publication in any official reporter. As indicted in the references above, copies of each of those opinions and judgments are included within the Appendices to this Petition for Writ of Certiorari.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was delivered on November 1, 1994, and Petitioner Deborah L. Floyd's petition for rehearing was denied on December 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and SUP. CT. R. 10.1(a), (c).

RULE INVOLVED

FEDERAL RULE OF CIVIL PROCEDURE 8(a)

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short

and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several types may be demanded.

STATEMENT OF THE CASE

The issue presented in this case is whether a district court may impose a heightened pleading standard upon a plaintiff, disregarding the provisions of FED. R. CIV. P. 8(a)(2) which requires that a plaintiff need only make "a short and plain statement of the claim" asserted, when the defendant is a government official who may have qualified immunity from suit.

Petitioner Deborah L. Floyd ("Floyd"), a former Vice-President of Student Development at Respondent Collin County Community College ("the College"), filed her Plaintiff's Complaint and Jury Demand in this action against her former employer, its president, and its governing bodies and members of the board of trustees in their respective individual and official capacities, seeking compensation for the damages suffered as a result of actions against Floyd taken in retaliation for Floyd's testimony in a hearing before the Office of Civil Rights supporting a handicapped student's assertions that her civil rights had been denied by her employer in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Such

actions against Floyd were alleged to be in violation of 42 U.S.C. §§ 1983 and 1985 and Texas state law.

Without answering the complaint, Respondents filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6), seeking the dismissal of most of Floyd's claims on the grounds, among others, that the allegations were insufficient to state a 42 U.S.C. § 1983 claim against the individual defendants under the Fifth Circuit's heightened pleading standard.

By Order entered April 2, 1992, the District Court required Floyd to file an amended complaint sufficient to meet the heightened pleading requirements of *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985). By its June 2, 1992 Order, the District Court dismissed Floyd's claims under 42 U.S.C. §§ 1983 and 1985(3), finding that she had failed to comply with the pleadings standard imposed.

In response to the numerous pending motions, on June 16, 1993, the District Court entered an Order finding, among other things, that this Court's opinion in *Leatherman v. Tarrant County Narcotics Intelligence*, ___ U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 570 (1993), did not justify reconsideration of the prior dismissal based upon imposition of a heightened pleading standard for claims against individual defendants, although Floyd's claims under 42 U.S.C. § 1983 against Respondent Collin County Community College District ("the District") were resurrected by *Leatherman*, those latter claims no longer being subject to the heightened pleading requirement. Thereafter, the parties presented a proposed Agreed Final Judgment permitting dismissal without prejudice of the 42 U.S.C. § 1983 claims against the District to allow filing of this appeal.

This appeal was submitted to a panel of the Fifth Circuit Court of Appeals on October 31, 1994, which affirmed the District Court rulings by a per curium opinion filed November 1, 1994, and denied Floyd's subsequent petition for rehearing and request for en banc review by summary order dated December 15, 1994.

REASONS FOR GRANTING THE WRIT

I. This Petition Raises Issues Already Acknowledged By This Court To Be of Exceptional Importance.

This is a case of national importance and one with which this Court is familiar, having granted a petition for writ of certiorari less than two months ago (January 20, 1995) in *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993), *cert. granted*, ___ U.S. ___, 115 S.Ct. 929, 130 L.Ed.2d 876 (1995), a decision raising identical issues to those presented to the Court herein. Accordingly, the arguments asserted in the *Kimberlin v. Quinlan* petition are incorporated as a basis for the request herein.

The issue was raised generally before this Court in connection with an appeal also from the Fifth Circuit Court of Appeals in *Leatherman v. Tarrant County Narcotics Intelligence*, 954 F.2d 105 (5th Cir. 1992), *overruled*, ___ U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 570 (1993). Faced with the conflict between the so-called "heightened pleadings standard" and FED. R. CIV. P. 8(a)(2), Justice Rehnquist, speaking for a unanimous Court, wrote:

> But examination of the Fifth Circuit's decision in this case makes it quite evident that the "heightened pleading standard" is just what it purports

> to be: a more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief.
>
> * * *
>
> We think that it is impossible to square the "heightened pleading standard" applied by the Fifth Circuit in this case with the liberal system of "notice pleading" set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief."
>
> * * *
>
> Perhaps if Rules 8 and 9 were re-written today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

Leatherman v. Tarrant County Narcotics Intelligence, 113 S.Ct. at 1162-63.

Although straight forwardly rejecting the propriety of judicially imposing higher than FED. R. CIV. P. 8 notice pleading standards for any claim which falls outside the scope of FED. R. CIV. P. 9 (*"expressio unius est exclusio alterius"*), Justice Rehnquist opened a door for the dispute to continue in the circuits when he limited the Court's holding as follows:

> . . . unlike various governmental officials, municipalities do not enjoy immunity from suit – either absolute or qualified – under § 1983. . . . We thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials.

Leatherman, 113 S.Ct. at 1162.

As a result, the conflict again has raged on in the Fifth Circuit and other circuits in connection with obtaining uniform pleading requirements for claims involving governmental officials. Under present legal pleading standards, the constitutional rights of citizens and the immunities of government officials are subject to different standards depending upon the forum in which a lawsuit is filed.

II. The Fifth Circuit Has Now Addressed And Abandoned The Heightened Pleadings Issue, Having Introduced A Procedure Distinct From All Other Federal Courts of Appeals.

Although recognizing that the *Leatherman* decision clearly overrules the heightened standard for pleadings defined in *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), with respect to municipalities, *Ashe v. Corlev*, 992 F.2d 540, 545 (5th Cir. 1993), the Fifth Circuit specifically declined ruling on the issue as it applies to individuals on numerous occasions when asked to resolve this nettlesome question. *Cinel v. Connick*, 15 F.3d 1338, 1341-42 (5th Cir. 1994); *Richardson v. Oldham*, 12 F.3d 1373, 1380 (5th Cir. 1994); *Burns-Toole v. Byrne*, 11 F.3d 1270, 1273-75 (5th Cir. 1994).

The Fifth Circuit finally acknowledged the issue as one of material importance and indicated that it would address same in *Schultea v. Wood*, No. 93-2186, 1994 U.S. App. LEXIS 23671 (August 26, 1994), in which case en banc rehearing without oral argument was granted, then oral argument was scheduled, only to be followed by a decision entered last week that raises more questions than it answers. *Schultea v. Wood*, No. 93-2186, 1995 U.S. App. LEXIS 4673 (March 9, 1995).

A. The Fifth Circuit's Attempts to Protect the Heightened Pleadings Requirement After *Leatherman*; Floyd's Claims Distinguished.

The Fifth Circuit was first presented but declined to address the issue of applicability of the *Leatherman* decision to the rationale of *Elliott v. Perez* in the *Burns-Toole v. Byrne* case, in which that appellant was accused by this Court of seeking "to side-step her lack of evidence by attacking the standard that the district court applied to her claim." *Burns-Toole v. Byrne*, 11 F.3d at 1275. Shortly thereafter a panel of that Court with two of the same circuit judges and the same judge writing for that panel again declined to reach the heightened pleading question as to individual government officials, concluding that the appellants had failed to meet their "summary judgment burden." *Richardson v. Oldham*, 12 F.3d at 1380.

Because both the *Burns-Toole v. Byrne* and the *Richardson v. Oldham* opinions arose from summary judgments, it fairly may be argued that the court properly focused on the competent evidence reflecting the existence or absence of a material disputed fact rather than

on the sufficiency of the parties' pleadings. However, Floyd's appeal presents the review of the District Court's dismissal of a pleading resulting from the imposition of the heightened pleading standard to claims against individual government officials and is, therefore, distinguishable from those earlier opinions. As noted by Judge Wisdom (who sat on the Fifth Circuit panel in this proceeding) in the *Richardson* opinion:

> A case will inevitably arise that will force us to assess the impact of the Supreme Court's *Leatherman* reasoning on our *Elliott v. Perez* precedent, but this is not that case.

Richardson v. Oldham, 12 F.3d at 1380. Floyd's appeal did present the Court with that anticipated case, but an en banc hearing curiously was denied by summary order.

That Court again came close to addressing this important issue in *Cinel v. Connick*. Once again *Elliott v. Perez* survived because the Court found that under either the notice pleading or heightened pleading standards the appellant's pleadings were insufficient to meet a motion under FED. R. CIV. P. 12(b)(6). *Cinel v. Connick*, 15 F.3d at 1342. The Court rejected the appellant's claim that amendment should be permitted rather than dismissal by finding that appellant's failure to request the right to amend was fatal to that argument on appeal. *Cinel v. Connick*, 15 F.3d at 1346. However, in this case Floyd specifically requested the opportunity to replead, stating:

> If, after review of Floyd's Complaint, the Court is of the opinion that the Complaint does not meet the notice requirements of FED. R. CIV. P. 8, which Floyd asserts would be an incorrect conclusion . . . , the Court should enter an order to

> that affect, providing Floyd reasonable time to amend her Complaint to meet any purported deficiencies identified under the pleading requirements of FED. R. CIV. P. 8.

Plaintiff's Motion to Reconsider Dismissal and Response to Motion for Summary Judgment (March 5, 1993), Record on Appeal, p. 337.

On September 19, 1994, a panel of the Fifth Circuit concluded, not surprisingly, that it would not read the language of *Leatherman* to mean that FED. R. CIV. P. 8 required only notice pleading, but would continue to rely upon the battered, at least partially overruled *Elliott v. Perez* decision. *Babb v. Dorman*, 33 F.3d 472 (5th Cir. 1994). Curiously, the *Babb v. Dorman* opinion was preceded by the August 9, 1994 panel decision on the heightened pleadings issue in *Schultea v. Wood*, 27 F.3d 1112 (5th Cir. 1994), and the August 26, 1994 decision of the Fifth Circuit, on its own motion, in which it recognized the responsibility to address this important issue by agreeing to rehear that case en banc, but without oral argument. *Schultea v. Wood*, No. 93-2186, 1994 U.S. App. LEXIS 23671 (5th Cir. 1994). Although Floyd made a request that her appeal also be considered with the en banc review in *Schultea v. Wood*, her request was rejected summarily.

B. The *Schultea v. Wood* En Banc Opinion: A New Pleadings Procedure In Qualified Immunity Cases.

In an opinion entered on March 9, 1995, that is described by concurring panel judges as "novel," "interesting" (*Schultea v. Wood*, 1995 U.S. App. LEXIS 4673, pp.

23, 35 (Jones, J., concurring; Garza, J., specially concurring)), and "troubling" (*Id.* at p. 34 (Garza, J., specially concurring)), Judge Higginbotham, writing for the en banc panel of the Fifth Circuit Court of Appeals, appears to have abandoned the heightened pleading standard for a new procedural scheme under FED. R. CIV. P. 7(a) in cases involving government official's defensive claims of qualified immunity.

Although the majority concluded that "nothing in *Leatherman* disturbed our holding in *Elliott v. Perez*" (*Id.* at 6), one of the concurring opinions observes that:

> Instead of relying on inferences from *Leatherman*, the majority opinion summons *Gomez v. Toledo*, 446 U.S. 635 (1980),(from the grave?) *to jettison heightened pleading.*

Id. at 26 (Jones, J., concurring) (emphasis added).

The specially concurring opinion summarizes this new procedure as follows:

> Instead [of the imposition of a heightened pleading standard], a plaintiff will be able to wait to see whether the defendant will raise the qualified immunity defense in his answer, and the plaintiff will be required to meet the defense only if the district court orders him to file a reply [under FED. R. CIV. P. 7(a)]. If the district court does order a reply, the plaintiff can meet the qualified immunity defense in the reply, a pleading to which even the majority's "more than conclusions" pleading requirement does not apply.

Id. at 31 (Garza, J., specially concurring).

It is significant that although Floyd's request to join *Schultea v. Wood* for en banc consideration was denied summarily, the majority's decision that "we will no longer insist that plaintiff fully anticipate the defense in his complaint at the risk of dismissal under Rule 12" (*Id.* at 6), conflicts with the District Court's ruling which dismissed Floyd's complaint without requiring Respondents to first plead their defense of qualified immunity.

Accordingly, the Fifth Circuit's procedure as announced in *Schultea v. Wood* is inconsistent with the heightened pleading standard still imposed by other circuits despite this Court's *Leatherman* decision. In addition, the implementation of the Fifth Circuit's new procedure (or resurrection of old procedure, as characterized by the majority (*Id.* at pp. 16-20)) is contrary to the ruling of the District Court below, further requiring the reversal of the Fifth Circuit Court's opinion in this proceeding.

III. Review Is Warranted In This Case Because Petition For Writ of Certiorari Was Granted In *Kimberlin v. Quinlan* And Is Necessary To Resolve The Confusion And Conflict in Other Federal Courts of Appeal.

Although many circuits continue to impose a higher pleadings standard after *Leatherman* in cases involving defendants who are government officials, other circuit opinions have held that the heightened pleading standard is not appropriate under 42 U.S.C. § 1983 claims against individuals or municipality defendants. *See, Elliot v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991), *cert. denied*, ___

U.S. ___, 112 S.Ct. 973 (1992) (the Seventh Circuit rejected stricter pleading requirements, determining it was better "to recognize official immunity in an affirmative defense, which need be asserted only after a plaintiff gets past the (slight) hurdles established by Rules 8 and 9(a)"); *Bergquist v. County of Cochise*, 806 F.2d 1364, 1367 (9th Cir. 1986) (in response to defendants' request to impose a heightened pleadings standard similar to the Fifth Circuit's, this Ninth Circuit panel stated that it was "not the law in this circuit," specifically rejecting *Elliott v. Perez*).[1]

In more recent cases, the conflict between circuits and disagreement with imposition of the heightened pleading requirements has become more pronounced. *See e.g., Black v. Lane*, 22 F.3d 1395, 1399-1400 (7th Cir. 1994) (holding a complaint in a § 1983 action against individual defendants is scrutinized under FED. R. CIV. P. 8, not a heightened pleadings standard); *Oropallo v. Parrish*, No. 93-1953, 1994 U.S. App. LEXIS 9748, p. 8 (1st Cir. May 5, 1994) (in suit against prison officials, court held that the pleading standard in civil rights cases required accepting factual allegations as true and construing facts in light most favorable to plaintiff); *Sapp v. Cunningham*, 847 F.Supp. 893, 901 n. 9 (D. Wyo. 1994) (after *Leatherman*, a plaintiff's complaint cannot be subjected to any type of

---

[1] Curiously, the later decision of *Branch v. Tunnell*, 14 F.2d 449 (9th Cir.), *cert denied*, ___ U.S. ___, 114 S.Ct. 2704 (1994), appears to contradict squarely the holding of *Bergquist* without addressing the decision at all. In addition, the concurring opinion in *Schultea v. Wood*, 1995 U.S. App. Lexis 4673, p. 23 n. 4 (Jones, J., concurring), incorrectly cites *Elliot v. Thomas*, as a case which "embraced a heightened pleading standard in qualified immunity cases."

heightened pleading requirement even in the face of a claim of qualified immunity); *U.S. v. Pennsylvania*, 832 F.Supp. 122, 125-26 (E.D. Penn. 1993) (Rule 8 governs review of claims in civil actions against state, governor, secretary of department of welfare and deputy secretary of mental retardation).

This confusion and conflict can be traced in large part to the express reservation placed on the scope of Justice Rehnquist's otherwise clear and direct opinion in *Leatherman*. The importance of consideration of this issue by this Court is illustrated not only by confusion in the Fifth Circuit following *Leatherman*, but by subsequent decisions in other circuits imposing a heightened pleading standard when faced with this conflict. A circuit court panel may not overrule the decision of a prior panel in the absence of en banc consideration or superseding decision of the Supreme Court. *Pruitt v. Levi Straus & Co.*, 932 F.2d 458, 465 (5th Cir. 1991).

Judge Goldberg pointed out this dilemma as follows:

> I agree that we, as a panel of this court, must politely decline their invitation to reexamine the wisdom of this circuit's heightened pleading requirement. Until such a time as the en banc court sees fit to reconsider *Elliott* or, more specifically, *Palmer*, and *in the absence of an intervening Supreme Court decision undermining our settled precedent*, I find myself constrained to obey the command of the heightened pleading requirement.

Leatherman v. Tarrant Co. Narcotics Intelligence and Coordination Unit, 954 F.2d 1054, 1061 (5th Cir. 1992), *overruled*,

___ U.S. ___, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (emphasis added).

As indicated in the opinions cited above, *Leatherman* would seem to present just such an anticipated intervening Supreme Court decision, permitting reconsideration of the issue by lower courts without the necessity of an en banc court. However, decisions in two other circuits forecast the desirability, if not necessity, that this matter be dispositively addressed by hearing before the United States Supreme Court.

In *Branch v. Tunnell*, 14 F.3d 449 (9th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2704 (1994), a panel of the Ninth Circuit Court of Appeals faced with the same issue concluded that it was without authority to consider the impact of *Leatherman* on an earlier related panel decision where such an analysis would require reconsideration of or overruling the prior decision, stating:

> Although *Leatherman* is closely on point, the Court expressly declined to make the extension necessary to undermine [a prior panel's decision in *Branch I*]. The Court cordoned off the question of whether a heightened pleading standard might be justified in an action against an individual officer.

Branch v. Tunnell, 14 F.3d at 456.

The District of Columbia Circuit made a similar determination in *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993), *cert. granted*, ___ U.S. ___, 115 S.Ct. 929, 130 L.Ed.2d 876 (1995), after noting the limited scope but applicable reasoning of *Leatherman*:

> In any event, because the Court did not address heightened pleading ir individual capacity suits, our precedent requiring that standard in such suits remains the governing law of this circuit.

Kimberlin v. Quinlan, 6 F.3d at 794, n. 9. The appellant in that case accordingly moved for en banc consideration which sparked a heated debate between the members of that court, resulting in denial by plurality (5 to 4 with 2 judges not participating) of the request for en banc consideration. *Kimberlin v. Quinlan*, 17 F.3d 1525 (D.C. Cir. 1994). The dissenting judges in *Kimberlin* clearly outline the reason why consideration by the United States Supreme Court is important in this case:

> In particular, I find it incomprehensible that this court has refused to rehear a case which is so clearly of great importance, and which rests upon a rule that is concededly "completely arbitrary and unrelated to the strength of the plaintiff's case." The result of our [denial to rehear en banc] is all the more unintelligible in light of the fact that a recent decision of the Supreme Court calls into question whether federal courts may ever apply "heightened pleading" requirements not provided for in the Federal Rules of Civil Procedure.
>
> Although *Leatherman* did not consider the permissibility of heightened pleading requirements in cases involving individual government officials, because that question was not before the Court, the logic of the decision indicates requirements are improper, except as expressly required by the Federal Rules.

> This court is bound by Supreme Court precedent, by fidelity to our own precedents, and by simple logic, both to rehear and revise *Kimberlin v. Quinlan*. ***It is my hope that the Supreme Court will see fit to reverse the error that this decision introduces into the law of this circuit.***

Kimberlin v. Quinlan, 17 F.3d at 1527, 1529 (Edwards, J., dissenting) (emphasis added).

By order dated October 3, 1994, this Court invited the Solicitor General to express the views of the United States in that case, *Kimberlin v. Quinlan*, ___ U.S. ___, 115 S.Ct. 50, 130 L.Ed.2d 10 (1995), and on January 20, 1995, granted petition for writ of certiorari. *Kimberlin v. Quinlan*, ___ U.S. ___, 115 S.Ct. 929, 130 L.Ed.2d 876 (1995).

As set forth above, Floyd's urging to this Court of her petition for writ of certiorari on the questions presented herein parallels the grant of the petition on January 20, 1995, by this Court in *Kimberlin v. Quinlan*. Accordingly, the Court should grant Floyd's petition to permit her the benefit of the decision of the highest court in the land on the issues raised by this request scheduled to be dispositively addressed in the matter already pending before this Court.

IV. The Rationale Of The Holding In *Leatherman* Requires Review And Rejection Of The Conflicting Heightened Pleading Standard In Cases Involving Government Officials Claiming Qualified Immunity.

Responding to the split on the issue now before this Court in the appellate circuits at that time, Judge

Goldberg of the Fifth Circuit succinctly defined the fallacy of *Elliott v. Perez* and the heightened pleading standard as imposed by other circuits in his concurring opinion:

> After all, every lawsuit, not just section 1983 cases, represents a potentially expensive proposition for the defendant, and Rule 11 governs every civil case, no matter what the subject of the suit. By adopting notice pleading and not fact pleading, Congress has struck the balance in favor of plaintiffs. . . . Unless this Court – or Congress rather – intends to abandon notice pleading altogether, it is difficult to justify singling out section 1983 municipality cases over *all* other cases for application of the heightened pleading requirement.

Leatherman v. Tarrant County Narcotics Intelligent and Coordination Unit, 954 F.2d 1054, 1060 (emphasis in original).

To assert that the underlying basis for *Elliott* remains viable at all is curious and contrary to seemingly clear language in this Court's unanimous *Leatherman* opinion that:

> We think that it is **impossible** to square the "heightened pleading standard" applied by the Fifth Circuit in this case with the liberal system of "notice pleading" set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief.

Id., 113 S.Ct. at 1163 (emphasis added). Although the Supreme Court expressly reserved the propriety of applying the heightened pleading standard to cases involving individual government officials, to reach a different result

based upon public policy, creative application of FED. R. CIV. P. 7, or for any other reason, undercuts the very logic of *Leatherman* that imposition of a higher pleading standard "must be obtained by the process of amending the Federal Rules, **not by judicial interpretation**." *Id.*, 113 S.Ct. at 1163 (emphasis added). The same Federal Rules that governed municipal liability in *Leatherman* apply with equal force to claims against individual government officials.

Application of the *Leatherman* rationale requires a holding that the District Court below committed error in applying that "heightened pleading standard" to Floyd's 42 U.S.C. §§ 1983 and 1985 claims against Respondents John Anthony and Board of Trustees in their individual capacities and that the Fifth Circuit Court of Appeals committed error in affirming that decision. Jurisprudential policy on the doctrine of qualified immunity cannot justify continued application of the heightened pleading standard in cases of individual liability. It is no less "impossible to square the 'heightened pleading standard' applied by the Fifth Circuit" for a municipality's liability "with the liberal system of 'notice pleading' set up by the Federal Rules . . . [under] Rule 8(a)(2)" than for the liability of an individual government official. Therefore, *Elliott v. Perez* and the heightened pleading standard spawned thereby should be rejected.

CONCLUSION

This petition for writ of certiorari should be granted and this cause aligned for review with the *Kimberlin v. Quinlan* proceeding.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40149

DEBORAH L. FLOYD,

Plaintiff-Appellant,

v.

COLLIN COUNTY COMMUNITY COLLEGE DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(4:91-CV-170)

(Filed Nov. 1, 1994)

Before WISDOM, KING and DUHÉ, Circuit Judges.

PER CURIAM:*

AFFIRMED. See Local rule 47.6.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

DEBORAH L. FLOYD	§	
	§	
v.	§	4:91CV170
COLLIN COUNTY COMMUNITY	§	
COLLEGE DISTRICT, et al	§	

ORDER

(Filed Apr. 2, 1992)

Pending before the Court is defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), and having considered the motion, and the response thereto, the Court is of the opinion that it should defer ruling on this matter and order plaintiff to replead.

On September 11, 1991, plaintiff filed suite against Collin County Community College District ("CCCCD"), Collin County Community College (the "College"), Collin County Community College District Board of Trustees (the "Board") and individual defendants sued in their official and individual capacity. Plaintiff's claims arise out of her former employment as Vice President of Student Development of the College and her placement on administrative leave and subsequent termination. Plaintiff's complaint alleges that defendants denied her due process under color of state statute and CCCCD's rules and regulations, that defendants were engaged in an unlawful conspiracy in violation of 42 U.S.C. §§ 1983 and 1985(3) and retaliation in violation of § 504 of the

Rehabilitation Act of 1973, 29 U.S.C. § 794.[1] Plaintiff additionally alleges state law tort claims for conspiracy, tortious interference with contractual relations, slander, intentional infliction of emotional distress and invasion of privacy.

On October 3, 1991, defendants' Motion to Dismiss was filed alleging the following: (1) plaintiff does not have separate claims against CCCCD, the College, the Board, and the individual defendants in their official capacities; (2) plaintiff's conspiracy claims are insufficient to state a claim under §§ 1983 and 1985(3); (3) plaintiff's due process allegations are insufficient to state a § 1983 claim against the individual defendants; and (4) plaintiff's state law tort claims are barred by governmental immunity.

First, plaintiff's allegations against the individual defendants clearly do not meet the heightened pleading requirements of *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985). These allegations lack the requisite detail and specificity which *Elliott* demands. The presence of such vagueness and ambiguity in all of these allegations signals the absence of the detailed factual allegations that the complaint must contain in order to comply with *Elliott*. In their present form, these allegations do not show that the defendants could not successfully assert a defense of qualified immunity.

---

[1] Plaintiff concedes that administrative relief and remedy for this claim have not been exhausted at the time of the filing of her complaint. Complaint, p. 13.

Plaintiff's conspiracy allegations against defendants under § 1983 do not meet the necessary pleading requirements. In civil rights cases, a conspiracy claim must "plead the operative facts upon which their claim is based. Bald allegations that a conspiracy existed are insufficient." *Young v. Biggers*, 938 F.2d 565 (5th Cir. 1991). Plaintiff's allegations merely allege that a conspiracy existed naming only John Anthony as one of the actors involved in the conspiracy without specifying what illegal acts he perpetrated.

Plaintiff's conspiracy allegations against defendants under § 1985(3) also do not meet the necessary pleading requirements. In order to adequately plead a cause of action under § 1985, plaintiff must allege the existence of a conspiracy and " 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions.' " *Senigaur v. Beaumont Indep. School Dist.*, 739 F. Supp. 1098, 1099 (E.D. Tex. 1990) (quoting *Griffin v. Breckenridge*, 91 S.Ct. 1790 (1971). Plaintiff has not fulfilled these requirements. Furthermore, plaintiff fails to plead factual details of each defendants part in the alleged conspiracy. Plaintiff should replead and plead facts that detail each defendants' alleged wrongful actions toward plaintiff.

It is therefore, ORDERED that the plaintiff shall file an amended complaint within twenty (20) days of the date of this ORDER to meet the pleading requirements set forth in this Order.

Signed this 2nd day of April, 1992.

/s/ Paul Brown
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

DEBORAH L. FLOYD	§	
	§	
v.	§	4:91CV170
COLLIN COUNTY COMMUNITY	§	
COLLEGE DISTRICT, et al	§	

ORDER

(Filed Jun. 2, 1992)

Pending before the Court is defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), and having considered the motion, and the response thereto, the Court is of the opinion that the motion should be granted.

On September 11, 1991, plaintiff filed suit against Collin County Community College District ("CCCCD"), Collin County Community College (the "College"), Collin County Community College District Board of Trustees (the "Board") and individual defendants sued in their official and individual capacities. Plaintiff's claims arise out of her former employment as Vice President of Student Development of the College and her placement on administrative leave and subsequent termination. Plaintiff's complaint alleges that defendants denied her due process under color of state statute and CCCCD's rules and regulations, that defendants were engaged in an unlawful conspiracy in violation of 42 U.S.C. §§ 1983 and 1985(3) and retaliation in violation of § 504 of the

Rehabilitation Act of 1973, 29 U.S.C. § 794.[1] Plaintiff additionally alleges state law tort claims for conspiracy, tortious interference with contractual relations, slander, intentional infliction of emotional distress and invasion of privacy.

On October 3, 1991, defendants' Motion to Dismiss was filed alleging the following: (1) plaintiff does not have separate claims against CCCCD, the College, the Board, and the individual defendants in their official capacities; (2) plaintiff's conspiracy claims are insufficient to state a claim under §§ 1983 and 1985(3); (3) plaintiff's due process allegations are insufficient to state a § 1983 claim against the individual defendants; and (4) plaintiff's state law tort claims are barred by governmental immunity.

On April 2, 1992, this Court deferred ruling upon defendants' Motion to Dismiss and ordered plaintiff to replead her claims under §§ 1983 and 1985(3) and to replead in compliance with *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985). Plaintiff has failed to comply.[2] Therefore, plaintiff's claims under §§ 1983 and 1985(3) should be dismissed.

It is therefore ORDERED that plaintiff's § 1983 and § 1985 claims are hereby DISMISSED with prejudice.

---

[1] Plaintiff concedes that administrative relief and remedy for this claim have not been exhausted at the time of the filing of her complaint. Complaint, p. 13.

[2] The Court granted plaintiff one extension to file her amended complaint. Plaintiff's second motion for extension was denied.

It is further ORDERED that all requested relief not specifically granted herein is hereby DENIED.

Signed this 2nd day of June, 1992.

/s/ Paul Brown
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

DEBORAH L. FLOYD Plaintiff	§ §	
v.	§ §	NO. 4:91cv170
COLLIN COUNTY COMMUNITY COLLEGE DISTRICT, et al. Defendants	§ § §	

ORDER

Pending before the Court is Defendants' Motion for Judgment on the Pleadings or Alternatively, for Summary Judgment,[1] and Plaintiff's Motion to Reconsider Dismissal. The Court, having considered the motions and responses, is of the opinion that defendants' motion should be GRANTED in part AND plaintiff's motion should be GRANTED in part.

Introduction

On September 11, 1991, plaintiff Deborah Floyd filed suit against Collin County Community College District (the "District"), Collin County Community College (the "College"), Collin County Community College Board of Trustees (the "Board of Trustees"), and several individual

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[1] Because defendants rely on evidence outside the pleadings, the Court, pursuant to Rule 12(b) treats this motion as a motion for summary judgment.

defendants[2] sued in their official and individual capacities (collectively "the defendants"). Plaintiff's claims arise out of her former employment as Vice President of Student Development. Plaintiff brings her claims under 42 U.S.C. §§ 1983 and 1985 alleging that the College denied her due process in not renewing her contract and a conspiracy by the defendants to retaliate against her for certain actions she had taken.[3] Plaintiff also alleges state tort claims for conspiracy, tortious interference with contractual relations, slander, intentional infliction of emotional distress, violation of the Texas Whistleblower statute, and invasion of privacy.

In October 1991, defendants filed their Motion to Dismiss contending that: (1) plaintiff does not have separate claims against the District, the College, the Board, and the individual defendants sued in their official capacities; (2) that plaintiff's conspiracy claims are insufficient to state a claim under §§ 1983 and 1985; (3) that plaintiff's

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[2] The individuals sued in both their official and individual capacities, are Board of Trustee members Carey Cox, Margaret Reynolds, Glenn Justice, Tino Trujillo, Sue Willard Olivier, James Dickson, E.T. Boon, J.R. Collins, and Gary Harris. Plaintiff also sued the President of the College John Anthony.

[3] Plaintiff contends that she received negative performance reviews, was placed on involuntary administrative leave, and ultimately wrongfully terminated because of her testimony against the District that a handicapped student's rights had been denied in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and 34 C.F.R. Part 104. Construing the complaint liberally, this Court cannot read the complaint to state a cause of action under the Rehabilitation Act. Nor has plaintiff put forward any legal authority for the proposition that such a removed retaliation claim exists under the Rehabilitation Act.

due process allegations are insufficient to state a § 1983 claim against the individual defendants; and (4) that plaintiff's state law tort claims are barred by governmental immunity.

In April 1992, this Court deferred ruling upon Defendants' Motion to Dismiss and ordered plaintiff to replead her claims under §§ 1983 and 1985 in compliance with *Elliot v. Perez*, 751 F.2d 1472 (5th Cir. 1985). The Court also instructed the plaintiff to plead the necessary elements for a § 1985 conspiracy claim. Despite being granted an extension to replead her federal claims, plaintiff failed to file an amended complaint, and the Court dismissed the federal claims.[4]

In March 1993, the United States Supreme Court abolished the heightened pleading standard for § 1983 suits against municipalities finding that it was inconsistent with the notice pleading requirements of Federal Rule of Civil Procedure 8(a)(2). *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S.Ct. 1160 (1993). Plaintiff now requests that this Court reverse its prior dismissal of plaintiff's §§ 1983 and 1985 claims in light of *Leatherman*. Defendants, on the other hand, seek to dismiss the remaining state claims, contending that they are either barred by immunity or by an applicable statute of limitations.

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[4] The Court initially gave the plaintiff 20 days to replead. Plaintiff's second motion for extension was then denied.

Summary Judgment Standard

The granting of summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The trial court must resolve all reasonable doubts in favor of the party opposing the motion. *Casey Enterprises, Inc. v. Am. Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981) (citations omitted). The party seeking summary judgment carries the burden of demonstrating that there is no actual dispute as to any material fact in the case. This burden, however, does not require the moving party to produce evidence showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2554 (1986). The moving party satisfies its burden by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.*

Once the moving party has satisfied its burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). If the nonmovant fails to set forth specific facts in support of allegations essential to that party's claim and on which that party will bear the burden of proof, then summary judgment is appropriate. *Celotex*, 106 S.Ct. at 2552-53. Even if the nonmovant brings forth evidence in support of its allegations, summary judgment will be appropriate "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986) (citations omitted).

Discussion

Plaintiff's Tort Claims

Under the doctrine of sovereign immunity, a state or governmental unit is not liable for the torts of its agents or officers unless there is a constitutional or statutory waiver of immunity. *Mt. Pleasant Indep. School Dist. v. Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989). The District, College, and Board of Trustees are state educational agencies and are immune from liability to the same extent as an independent school district. *Hander v. San Jacinto Junior College*, 519 F.2d 273, 279 n.3 (5th Cir. 1975); *Freeman v. Del Mar College*, 716 S.W.2d 729, 731 (TEX. APP. – Corpus Christi 1976, no writ).

An independent school district performing governmental functions can be held liable in tort only to the extent permitted by the Texas Tort Claims Act (the "Act"). TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001 et seq.; *Williams v. Conroe Indep. School Dist.*, 809 S.W.2d 954, 957 (TEX. APP. – Beaumont 1991, no writ). Furthermore, trustees and agents of a school district, while acting in their official capacity, enjoy the same governmental immunity as does the District. *Stimpson v. Plano Independent School Dist.*, 743 S.W.2d 944, 947 (TEX. APP. – Dallas 1987, writ denied).

Under the Act, the District, College, and Board of Trustees[5] can only be held liable for property damage, personal injury, or death arising from the operation or use of a motor vehicle or for personal injury and death

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[5] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(b) (Vernon 1986).

caused by a condition or use of tangible personal or real property. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (1986). Because plaintiff's allegations do not involve use of a motor vehicle or use of tangible personal or real property, the District, College, Board of Trustees, and the individual defendants sued in their official capacities are immune from liability for plaintiff's state law tort claims. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (1986). Therefore, plaintiff's state law claims for conspiracy, tortious interference with contractual relations, slander, intentional infliction of emotional distress, and invasion of privacy should be DISMISSED.[6]

Individual Capacity Claims

School district trustees and employees sued in their individual capacities are entitled to the immunity offered by the Texas Education Code. Section 21.912(b) of the Education Code provides:

> No professional employee of any school district within this State shall be personally liable for any act incident to or within the scope of employment, and which act involves the exercise of judgment or discretion on the part of the employee, except in circumstances where professional employees use excessive force in the discipline of students or negligence resulting in bodily injury to students.

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[6] Plaintiff's claims would also be barred by the intentional tort exception to the Act. TEX. CIV. PRAC. & REM. CODE ANN. § 101.057 (1986).

TEX. EDUC. CODE ANN. § 21.912(b) (Vernon 1987). In this case, it is undisputed that all alleged acts occurred in the course and scope of employment and involved exercises of discretion by the defendants. Therefore, plaintiff's state law claims against President Anthony and the trustee defendants in their individual capacities are also dismissed *See also Hammond v. Katy Independent School District*, 821 S.W.2d 174, 179 (TEX. APP. – Houston [14th Dist.] 1991, no writ); *Anderson v. Blankenship*, 790 F.Supp. 695 (E.D. Tex. 1992).

Plaintiff's Whistleblower Claim

In paragraphs 6E and 6F of her complaint, plaintiff raises a claim under the Texas Whistleblower Act (the "Whistleblower Act"), TEX. REV. CIV. STAT. ANN. art. 6252-16a (1987). Plaintiff contends that she was not rehired because of the complaint she filed with the Office of Civil Rights on October 2, 1990.

Section 2 of the Whistleblower Act makes it illegal to "suspend or terminate the employment of, or otherwise discriminate against, a public employee who reports a violation of the law to an appropriate law enforcement agency if the employee report is made in good faith." TEX. REV. CIV. STAT. ANN. art. 6252-16(A)(2) (Vernon Supp. 1992). Under § 3(a) of the Whistleblower Act, an employee seeking relief "must sue not later than the 90th day after the day the alleged violation occurred or was discovered by the employee through the use of reasonable diligence." TEX. REV. CIV. STAT. ANN. art. 6252-16(A)(3) (Vernon Supp. 1992). Section 3(d) of the Whistleblower Act also requires that "[b]efore bringing an action under

this section, an employee . . . must exhaust any applicable grievance or appeal procedures adopted by the employing local governmental body to resolve disputes concerning the suspension or termination . . . " *Id.*, § 3(d). The grievance or appeal procedures must be invoked not later than the 90th day after the date the alleged violation occurred or was discovered through the use of reasonable diligence. *Id.*

Plaintiff was placed on administrative leave in September 1990. She was given notice of the nonrenewal of her contract in January 1991. Thus, plaintiff had at most until the end of April 1991 to assert a Whistleblower claim and invoke the College's grievance procedure. To this date, plaintiff has not invoked the District's grievance procedure and thus her Whistleblower Act claim should be dismissed.[7]

§§ 1983 and 1985 Claims

Plaintiff moves for reconsideration of her §§ 1983 and 1985 actions in light of the Supreme Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence*, 113 S.Ct. 1160 (1993). In *Leatherman*, the Supreme Court held that a "heightened pleading standard" does not apply in civil rights actions alleging municipal liability under

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[7] Plaintiff contends that she was denied an adequate time for discovery. On December 30, 1992, the Court ordered an additional sixty days of discovery to complete discovery for purposes of responding to the pending motion for summary judgment. The Court has granted plaintiff ample time to conduct discovery and respond to dispositive motions.

§ 1983. However, the Court expressly declined to consider whether heightened pleading requirements apply in cases involving individual government officials. *Id.*

Plaintiff interprets *Leatherman* to abolish heightened pleading requirements in all cases. However, the Fifth Circuit's heightened pleading standard as to individual defendants is still the law in this circuit. *See Nieto v. San Perlito Indep. School Dist.*, 894 F.2d 174, 177 (5th Cir. 1990). The public policy concerns embodied in the qualified immunity defense and the heightened pleading requirement are present in suits against public officials in their individual capacities. These concerns should not be disturbed until the Fifth Circuit expressly announces an intention to abrogate the heightened pleading requirement in its entirety.

Plaintiff's § 1985 conspiracy claim against the District and against the individual defendants should still be dismissed. Plaintiff's conspiracy allegations against defendants under § 1983 are inadequate. In civil rights cases, a conspiracy claim must "plead the operative facts upon which their claim is based. Bald allegations that a conspiracy existed are insufficient to state a cause of action. *Young v. Biggers*, 938 F.2d 565, 569 (5th Cir. 1991). Plaintiff's allegations merely allege that a conspiracy existed naming only John Anthony as one of the actors involved in the conspiracy without specifying what illegal acts he perpetrated. In order to adequately plead a cause of action under § 1985, plaintiff must allege the existence of a conspiracy and " 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's actions.' " *Senigaur v. Beaumont*

Indep. School Dist., 739 F.Supp. 1098, 1099 (E.D. Tex. 1990) (*quoting Griffin v. Breckenridge*, 91 S.Ct. 1790, 1798 (1971).

Finally, in light of *Leatherman*, plaintiff's § 1983 suit for denial of due process against the District[8] is not subject to the heightened pleading requirements and should be restored.[9]

Conclusion

For the aforementioned reasons, plaintiffs' state law claims, her § 1985 claim, and her § 1983 claim against the defendants in their individual capacities should be DISMISSED. Plaintiff's § 1983 claim against the District remains for trial.

IT IS SO ORDERED.

Signed this 15th day of June, 1993.

/s/ Paul Brown
UNITED STATES
DISTRICT JUDGE

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[8] Plaintiff also has sued the College and the Board of Trustees. However, these entities are merely arms of the District and should not be viewed as separate causes of action.

[9] Because Texas is an employment-at-will state, an employer ordinarily has no duty to renew an employee's contract. However, plaintiff has alleged in her original complaint that her previous contract and the published rules of the college required notice of non-renewal by December of the year prior to expiration and that the District provided no such notice. Complaint, p. 6-7. Defendants have not argued in their brief that plaintiff had no property interest in continued employment.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40149

DEBORAH L. FLOYD,

Plaintiff-Appellant,

versus

COLLIN COUNTY COMMUNITY COLLEGE DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion November 1, 1994 5 Cir., (___), (___) F.3d

(December 15, 1994)

Before WISDOM, KING and DUHÉ, Circuit Judges.

PER CURIAM:

(✓) Treating the Suggestion for Rehearing En Banc as (a) Petition(s) for Panel Rehearing, the Petition(s) for Panel Rehearing is DENIED. No member of the panel nor Judge in regular-active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is also DENIED.

( ) Treating the Suggestion for Rehearing En Banc as (a) petition(s) for Panel Rehearing, the Petition(s) for Panel Rehearing is DENIED. The Court having been poled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ John M. Duhé, J.
United States Circuit Judge
REHG-6/Rev. 7/1/94

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

DEBORAH L. FLOYD, Plaintiff	§	
v.	§	CIVIL ACTION
COLLIN COUNTY COMMUNITY COLLEGE DISTRICT, COLLIN COUNTY COMMUNITY COLLEGE, JOHN ANTHONY, COLLIN COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES, and TRUSTEES CAREY COX, MARGARET F. REYNOLDS, GLENN W. JUSTICE, TINO TRUJILLO, SUE WILLARD OLIVER, JAMES DICKSON, E. T. BOON, J. R. (BOB) COLLINS, and GARY Z. HARRIS, jointly and severally,	§	NO. 4:91CV170 July Demanded
Defendants.	§	

AGREED FINAL JUDGMENT

On this 10th day of January 1994, came on before the Court, Plaintiff's Unopposed Motion for Non-Suit and the Court, having considered the agreement of the parties and pleadings on file, is of the opinion that the Motion is well taken and that final judgment should be entered in this cause. Therefore, it is

ORDERED that those due process claims asserted by Plaintiff Deborah Floyd against Defendant Collin County Community College District still pending before the

Court shall and are hereby dismissed without prejudice to refiling same; and, it is

FURTHER ORDERED that the dismissal herein and the dispositive determination of claims contained in this Court's June 15, 1993 Order, dispose of all issues raised by the parties in this cause and, therefore, a final judgment is hereby entered in this cause.

SIGNED this 10th day of January, 1994.

/s/ Paul Brown
UNITED STATES
DISTRICT JUDGE

AGREED TO:

/s/ Anthony A. Petrocchi
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Texas Bar No. 15851700

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ATTORNEYS FOR DEFENDANTS

Supreme Court, U.S.
FILED
APR 18 1995
OFFICE OF THE CLERK

No. 94-1533

In The

Supreme Court of the United States

October Term, 1994

DEBORAH L. FLOYD,

Petitioner,

v.

COLLIN COUNTY COMMUNITY COLLEGE DISTRICT, COLLIN COUNTY COMMUNITY COLLEGE, JOHN ANTHONY, COLLIN COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES, AND TRUSTEES CAREY COX, MARGARET F. REYNOLDS, GLENN W. JUSTICE, TINO TRUJILLO, SUE WILLARD OLIVER, JAMES DICKSON, E.T. BOON, J.R. (BOB) COLLINS, AND GARY Z. HARRIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit erred in affirming the District Court's dismissal of Petitioner's civil rights claims under 42 U.S.C. § 1983 against the individual Respondents in their individual capacities based upon the inadequacy of Petitioner's pleading.

LIST OF PARTIES

The names of all parties appear in the caption of this case.

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No. 94-1533

In The

Supreme Court of the United States

October Term, 1994

DEBORAH L. FLOYD,

Petitioner,

v.

COLLIN COUNTY COMMUNITY COLLEGE DISTRICT, COLLIN COUNTY COMMUNITY COLLEGE, JOHN ANTHONY, COLLIN COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES, AND TRUSTEES CAREY COX, MARGARET F. REYNOLDS, GLENN W. JUSTICE, TINO TRUJILLO, SUE WILLARD OLIVER, JAMES DICKSON, E.T. BOON, J.R. (BOB) COLLINS, AND GARY Z. HARRIS,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioner's claims were denied by the District Court and that denial was affirmed by the Court of Appeals without the issuance of an opinion by either court. Conformed copies of the Order of Affirmance by the Court of Appeals and the District Court's Final Judgment are

attached to the Petition for Writ of Certiorari as Appendices A and F, respectively. Relevant unpublished orders of the District Court signed April 2, 1992, June 2, 1992, and June 15, 1993, are attached to the Petition as Appendices B, C and D, respectively.

JURISDICTION

The Court of Appeals affirmed the District Court's judgment on November 1, 1994. Petition for Rehearing and a Suggestion for Rehearing En Banc were denied by the Court of Appeals on December 15, 1994. This Court has jurisdiction to review the judgment in this case in the Court of Appeals pursuant to 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction of this matter under 28 U.S.C. § 1291 as an appeal from a final judgment of the District Court. The District Court had jurisdiction to hear the merits of Petitioner's claims under 28 U.S.C. § 1331, 28 U.S.C. § 1332, and under the doctrine of pendent jurisdiction.

STATEMENT OF THE CASE

Deborah L. Floyd ("Floyd") brought this action against Collin County Community College District, a subdivision of the State of Texas ("District"), Collin County Community College ("College"), John Anthony, President of the College ("Anthony"), the District's Board of Trustees ("Board"), and each of the individual Trustees (herein so called) serving on the Board, claiming that alleged actions by the defendants resulted in a denial of

due process in violation of 42 U.S.C. § 1983, constituted a conspiracy to retaliate against her in violation of 42 U.S.C. § 1985(3), and gave rise to various state law claims. Floyd's Petition addresses only the federal claims against the individual defendants, Anthony and the Trustees, in their capacities as individuals.

Floyd was employed as Vice President of Student Development for the College from November 1, 1985, until July 26, 1991, when her employment with the College terminated as a consequence of the commencement of a new position she had accepted as President of Prestonsburg Community College in Prestonsburg, Kentucky. (R-294, 296-299). Floyd's Complaint alleged that in late 1989 certain administrators sought to dismiss a student. On January 3, 1990, Floyd wrote a memorandum advising against the dismissal and expressing concerns about possible violations of the Rehabilitation Act of 1973 because of the student's status. Floyd was outspoken about potential violations of the student's rights. On August 27, 1990, Floyd testified at an administrative proceeding conducted by the District, after which Anthony expressed to her his belief that her "January 3, 1990, memorandum was the student's 'entire case.' " (R-8).[1]

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[1] At page 3 of her Petition Floyd states that she seeks compensation for actions "taken in retaliation for Floyd's testimony in a hearing before the Office of Civil Rights". No such hearing is mentioned in Floyd's Complaint as a basis for her claim or otherwise. The only "hearing" alleged to have occurred is the District's August 27 administrative proceeding. The Complaint does refer to Floyd's own retaliation complaint filed with the Office of Civil Rights for the United States Department of Education which was pending at the time Floyd filed suit and with

The record indicates that sometime in September 1990 Anthony received a letter from a college staff member alleging that Floyd had made improper and possibly illegal use of college staff and faculty. Anthony made the decision to investigate these allegations and to place Floyd on administrative leave with pay during the investigation. Anthony met with Floyd and informed her of his decision. (R-294). Floyd alleges that at that meeting Anthony told her he was conducting an investigation based upon written complaints alleging that she had previously used college resources for her consulting business and had used District staff for her earlier wedding to Homer Reynolds, who was then suing her for divorce. She further alleged that she had no notice of any written complaints or their subject matter, that the sources of the complaints against her were not named, and that at no time during 1990 was Floyd confronted with any written charges or advised of any statements or names of witnesses. (R-9, 10). Floyd remained on leave until her employment terminated on July 26, 1991 (R-14).

Because of the August 31, 1991, expiration date of her current contract, Floyd was entitled under District rules to receive notice of whether her contract would be renewed before December 16, 1990. (R-7). At Floyd's request, the date for notice was extended through the end of January 1991, and on January 31, 1991, Floyd was given written notification that her contract would not be renewed. (R-10).

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respect to which the Office of Civil Rights later found no evidence of retaliation. (R-12, 13, 352, 353).

Floyd subsequently accepted employment as president of Prestonsburg Community College in Prestonsburg, Kentucky, and advised Anthony by letter that her official employment at Prestonsburg would commence on Monday, July 29, 1991. (R-296). Anthony accepted her letter as a letter of resignation. (R-298).

All defendants responded to Floyd's Complaint (R-1, *et seq.*) with a motion to dismiss filed pursuant to Rule 12(b)(6), F.R.C.P. (R-21, *et seq.*). On behalf of the individual defendants it was alleged, *inter alia*, that Floyd's conclusory allegations of conspiracy were insufficient to state a claim under Section 1983 in the absence of any pleading of operative facts upon which the claim was based, that no Section 1985(3) conspiracy claim was stated in the absence of any allegations of class-based discriminatory animus, and finally, that Floyd's allegations of denial of due process in violation of 42 U.S.C. § 1983 were inadequate because of the failure to plead violation of clearly established law and specific facts sufficient to overcome the qualified immunity defense. (R-29). In response the District Court held as to all defendants (1) that the Section 1983 conspiracy claim failed in the absence of a pleading of operative facts, since Floyd's allegations named a single conspirator without specifying what illegal acts he perpetrated (R-145, 146 [App. B-4]); and (2) that Floyd's Section 1985(3) conspiracy claim failed because of the absence of any pleading of class-based discriminatory animus (R-146 [App. B-4]). With respect to the Section 1983 due process claims against the individual defendants the District Court further held that Floyd's allegations lacked the requisite detail and specificity required by the Fifth Circuit Court of Appeals and

failed to show that the defendants could not successfully assert a defense of qualified immunity. (R-145 [App. B-3]). Consequently, Floyd was ordered to amend her pleadings within twenty days. When she failed to do so, her federal claims were dismissed. (R-163 [App. C]).

The individual defendants subsequently answered Floyd's Complaint, asserting, *inter alia*, their immunity defenses, and moved for and obtained summary judgment on the remaining state law claims. (R-376 [App. D]). While the defendants' motion for summary judgment was pending, this Court delivered its opinion in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___, 113 S. Ct. 1160 (1993) (hereinafter *"Leatherman"*), in which the heightened pleadings requirement required in civil rights actions by decisional law of the Court of Appeals for the Fifth Circuit was held invalid as to claims against municipalities. Based upon that decision, Floyd moved for reconsideration of the order disposing of her federal claims. In response the District Court, concurrently with its grant of summary judgment denying Floyd's state law claims, reinstated her Section 1983 due process claim against the District. It did not alter its rulings with respect to the individual claims or the conspiracy claims against the District. (R-376, 383-384 [App. D-16-18]).

REASONS FOR DENYING THE WRIT

The motions to dismiss filed on behalf of Anthony and the Trustees in response to Floyd's Complaint plainly raised their obvious defense of qualified immunity.

(R-29). With the benefit of five extensions of time (R-40, 50, 95, 105, 112) and eighty-two days to respond, Floyd made no effort to amend her Complaint to address the qualified immunity issue; nor did she take the ample opportunity to do so after her pleadings were ruled inadequate. Her due process claims against the individual defendants were dismissed as a consequence of that failure. The District Court had the opportunity to consider the adequacy of Floyd's pleadings both initially in the context of a motion to dismiss, and later, upon reconsideration, after the filing of answers and a motion for summary judgment. Without regard to the procedural context in which it occurred, the dismissal of Floyd's due process claim against the individuals because of her inadequate pleadings comported fully with the purpose and intended benefit of qualified immunity. The Court of Appeals' affirmance of the District Court's judgment without opinion sets no precedent in conflict with any decision of this Court or with another court of appeals. The writ should be denied because there are no "special and important reasons" for granting. Supreme Court Rule 10.1.

I. Qualified Immunity and Pleading Requirements.

The Fifth Circuit Court of Appeals saw the adoption of a "heightened pleading requirement" as a necessary adjunct to the doctrine of qualified immunity. *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985). Government officials are entitled to qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). Qualified immunity is generally provided to government officials "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S. Ct. 3034, 3038 (1987). As expressed in *Malley v. Briggs*, 475 U.S. 335, 106 S. Ct. 1092 (1986), qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." 475 U.S. at 341, 106 S. Ct. at 1096.

Operation of the standard for qualified immunity depends upon the level of generality employed in determining what law or rights are "clearly established." *Anderson v. Creighton* noted the example of the right to due process of law being quite clearly established, as a consequence of which any action which violates due process could be said to violate a clearly established right no matter how unclear it might be that the particular action was, in fact, a violation. 483 U.S. at 639, 107 S. Ct. at 3039. If, however, the test of "clearly established law" were to be applied at this level of generality, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Id.* As a consequence, a right must be "clearly established" in a more particularized sense: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. at 640, 107 S. Ct. at 3039. In other words, a plaintiff must not only allege the violation of a constitutional right, but also show that the illegality of the challenged conduct was

clearly established in factual circumstances closely analogous to those of the claim presented. *Richardson v. Oldham*, 12 F.3d 1373, 1381 (5th Cir. 1994). Unless the plaintiff's pleadings allege that the defendant reasonably should have known that his particular action violated clearly established federal law, the defendant should prevail. *Brown v. Glossip*, 878 F.2d 871, 874 (5th Cir. 1989).

In adopting a heightened pleading requirement the Fifth Circuit was influenced by the analysis in *Harlow v. Fitzgerald*, 457 U.S. 821, 102 S. Ct. 2727 (1982), of the reasons for providing qualified immunity to public officials and the revision of the doctrine by that decision made necessary to afford the protections the doctrine was intended to provide. *Harlow* provided a retrospective indicating that the doctrine of qualified immunity had been adopted as a balance between the need for a remedy in the event of an abuse of office on the one hand, and the personal and public time and expense involved in defending claims without merit on the other. This Court observed, " . . . [I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the defendant officials, but to society as a whole. The social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." 457 U.S. at 814, 102 S. Ct. at 2736 [citations omitted]. It was further observed that in initially establishing qualified immunity for public officials there had been reliance on the assumption that the standard drawn would permit insubstantial lawsuits to be quickly terminated. *Id.*

Unfortunately, however, qualified immunity, as it existed before *Harlow*, involved both objective and subjective elements, the subjective element being the malicious intentions (or conversely, the good faith) of the defendant. It was observed that litigation of the issue of intent, a factual issue often requiring a jury trial, resulted in substantial cost, distracted officials from their governmental duties, inhibited discretionary action, and deterred able people from public service. A further problem was that examination of subjective motivation could require broad ranging discovery and numerous depositions disruptive of effective government. 457 U.S. 816, 817; 102 S. Ct. 2737, 2736.

In keeping with the intended purpose of the doctrine of qualified immunity, this Court eliminated the subjective element from the qualified immunity defense and reformulated that defense so that it would be available to government officials so long as their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. 457 U.S. 818, 102 S. Ct. 2738. Further, the existence of qualified immunity could be determined by the judge, and until that issue was resolved, discovery should not be allowed. *Id.*

From *Harlow* the Fifth Circuit concluded, "Whether the official's immunity is absolute or qualified, allowing any but perhaps the most preliminary proceedings on the immunity-barred claim runs squarely counter to the doctrine's basic protective purpose: that officials be free to exercise their duties and functions without fear of having their attentions distracted by the subsequent claims of unhappy or unsuccessful litigants." 751 F.2d at 1478. And

it was to that end that the heightened standard of pleading was imposed by *Elliott v. Perez*.

Shortly after *Elliott v. Perez* was announced, its analysis of the underlying rationale for qualified immunity and the decision to take special measures to assure its benefits was reinforced by *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1985), which determined that an order denying a plea of qualified immunity was an appealable order. This Court observed that a defendant asserting qualified immunity is entitled to dismissal before the commencement of discovery unless the plaintiff's allegations state a claim of violation of clearly established law. Under *Harlow* there is an entitlement not to stand trial where qualified immunity exists. 472 U.S. 526, 105 S. Ct. 2815. "The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id.* Accordingly, the issue of qualified immunity was one too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the entirety of the case has been adjudicated. 472 U.S. 525, 105 S. Ct. 2814.

The Fifth Circuit has not been alone in adopting standards which aid in bringing about the intended benefit of qualified immunity, freeing public officials from the time and expense of protracted litigation. A majority of the other courts of appeals have adopted such standards. *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984); *Dunbar Corp. v. Lindsey*, 905 F.2d 754, 764 (4th Cir. 1990); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989), *cert. denied*,

494 U.S. 1088, 110 S. Ct. 1156 (1990); *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991); *Sawyer v. County of Creek*, 908 F.2d 663, 667 (10th Cir. 1990); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1586 (1993); *Hunter v. District of Columbia*, 943 F.2d 69, 75-76 (D.C. Cir. 1991).

Since *Leatherman*, in which this Court disapproved the Fifth Circuit's extension of the heightened pleadings requirement to suits against municipalities while expressly reserving review of the issue in civil rights suits against public officials in their individual capacities, courts of appeals have continued to apply heightened standards in reviewing claims against individuals. *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 593 (10th Cir. 1994); *Branch v. Tunnell*, 14 F.3d 449, 456 (9th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2704 (1994); *Kimberlin v. Quinlan*, 6 F.3d 789, 794 (D.C. Cir. 1993), *reh'g denied*, 17 F.3d 1525 (D.C. Cir. 1994) (per curiam), *cert. granted*, ___ U.S. ___, 115 S. Ct. 929 (1995); *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995) (en banc) (1995 WL 98234). *Contra Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995); *Dell v. Board of Education*, 32 F.3d 1053, 1064-65 (7th Cir. 1994).

From the inception of the heightened pleadings requirement in the Fifth Circuit its conflict with the concept of "notice pleading" was recognized. *Elliott v. Perez*, 751 F.2d 1472, 1483 (5th Cir. 1985) (Higginbotham, J., concurring). Perhaps spurred by this Court's emphasis on that conflict in *Leatherman*, 113 S. Ct. 1163, the Fifth Circuit in *Schultea v. Wood, supra*, developed a new analysis to supplant that found in *Elliott v. Perez*. As a starting point, *Schultea* suggests that in reality and as applied the "heightened pleading"

requirement established by *Elliott* is not all that "heightened." Rather, that court's "insistence on pleading with particularity translated to no more than an insistence that the complaint not plead conclusions." *Schultea* at ___. Under most post-*Elliott* cases in the Fifth Circuit a simple insistence that the plaintiffs plead more than conclusions would not have changed the result. *Schultea* at ___ (cases cited at n.2). Nevertheless, there was apparent concern that *Elliott* could only be regarded as a judicial amendment to Rule 9(b), F.R.A.P., having added civil rights claims to those types of cases requiring pleading with particularity in the original complaint. Accordingly, the Fifth Circuit has changed the document in which heightened pleading must appear from the original complaint to a reply, a pleading which the plaintiff can be ordered to file in response to a pleaded defense of qualified immunity, and a pleading to which Rule 8(a)(2), F.R.A.P. (requiring only a "short and plain statement of the claim") does not apply. *Schultea* at ___. Consistent with the intended benefit of qualified immunity, under *Schultea*, the district court "need not allow any discovery unless it finds that plaintiff has supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of the defendant's conduct at the time of the alleged acts." *Id.*[2]

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[2] It appears that the Fifth Circuit panel which affirmed the dismissal of Floyd's claims saw no potential that *Schultea* would present grounds for reinstatement of Floyd's claims. Rehearing en banc had been granted in *Schultea* on the court's own motion on August 26, 1994, *Schultea v. Wood*, 27 F.3d 1112, 1120 (5th Cir. 1994), and was pending on rehearing both at the time the judgment in the present case was affirmed on November 1, 1994, and at the time rehearing was denied on December 15, 1994.

Qualified immunity is the judicial doctrine which underlies and justifies the imposition of a requirement for more particularized and non-conclusory pleading in certain cases. That doctrine was not an issue in cases such as *Leatherman* in which the defendant was a municipality which did not enjoy immunity from suit, either absolute or qualified. 113 S. Ct. at 1162. That lack of justification combined with this Court's conclusion that it was "impossible to square" any heightened pleadings standard with "notice pleading" under the Federal Rules appears to have made it a simple matter to cut off any extension of the heightened pleadings requirement to municipalities. 113 S. Ct. at 1163. That is not the situation here, however; nor is it the situation in *Kimberlin v. Quinlan, supra,* which this Court presently has under consideration. In this case and *Kimberlin* the defendants are individual public officials who are entitled to all of the benefits of qualified immunity, including freedom from the time and expense of protracted litigation. That is a substantive right with which federal rules should not interfere. 28 U.S.C. § 2072(b). To the extent of any conflict with federal rules of pleading, specifically, Rule 8(a)(2), F.R.A.P., the rules should yield to the qualified immunity defense. *Schultea v. Wood, supra,* (Jones, J., concurring).

II. Floyd's Conclusory Pleadings Fall Short.

As the heightened standard of pleading was first articulated in the Fifth Circuit, "[T]he plaintiff's complaint [must] state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the

defense of immunity." *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985). This means the plaintiff's allegations must state a claim of violation of clearly established law, pleading facts with particularity. Conclusory allegations and technical buzz words are inadequate. *Jacquez v. Procunier*, 801 F.2d 789, 791, 792 (5th Cir. 1986). Complaints containing conclusory allegations without reference to material facts will not survive motions to dismiss. *Geter v. Fortenberry*, 849 F.2d 1550, 1553 (5th Cir. 1988). The pleadings must sufficiently allege that the defendant reasonably should have known that his particular actions violated clearly established federal law. *Brown v. Glossip*, 878 F.2d 871, 874 (5th Cir. 1989).

Floyd's efforts to plead a Section 1983 claim clearly fail under the heightened pleadings requirement. They likewise fall short of the "precision and factual specificity" required for a reply under *Schultea*. Further, given the pleadings necessary to overcome qualified immunity, Floyd's efforts fail under the minimal notice requirements of Rule 8(a)(2), F.R.A.P. Floyd simply pleads in "blunderbuss fashion" conclusory allegations of rights, privileges, immunities and due process which bring to mind this Court's concern that "Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 3039 (1987).

Floyd was obligated to overcome the readily apparent defense of qualified immunity in this case by pleading violation of clearly established federal law under circumstances in which the defendants reasonably should

have known that their particular actions violated that law. Here Floyd's pleadings do not make even a passing attempt to identify with any particularity the law alleged to be violated or the right asserted. Review of the passages from Floyd's pleadings in which Floyd purports to describe the rights violated confirms the impossibility of determining from them what law is said to have been broken, much less whether the defendants' conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2739 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815 (1985). The following excerpts illustrate:

> " * * * [T]his action . . . is commenced by Plaintiff to recover damages for injury to her person and property because of the deprivation of her rights and privileges in furtherance of a conspiracy mentioned in 42 U.S.C. § 1985, . . . and to redress the deprivation, under color of . . . law, . . . of rights, privileges or immunities secured by the constitution of the United States or act of Congress providing for equal rights of citizens or of all persons of the United States and to recover damage or secure equitable relief under 42 U.S.C. § 1983 providing for the protection of civil rights, ... "

(R-5).

> "Action of President Anthony, certain staff members and [District] Board Trustees was taken: . . . (4) with the intent and effect of acting under color of state statutes, [District] rules and regulations to subject Dr. Floyd to the deprivation of her rights, privileges and immunities secured by the constitution and laws of the

> United States and Texas, within the meaning and prohibition of 42 U.S.C. § 1983 and § 1985."

(R-11, 12).

> "Defendants have denied Plaintiff due process under color of state statute and [the District's] rules and regulations, among other things, in violation of 42 U.S.C. § 1983."

(R-12).

Nothing in the foregoing pleadings identifies the constitutionally protected right or privilege of which Floyd was deprived or of the manner in which she was denied due process.

In sum, Floyd's pleadings not only fail to plead violation of clearly established statutory or constitutional rights of which a reasonable person would have known, they fail to identify *any* constitutional right alleged to have been violated. *See, Siegert v. Gilley*, ___ U.S. ___, 111 S. Ct. 1789, 1794 (1991). As observed in *Siegert*, 111 S. Ct. at 1793, 1794, one of the purposes of immunity is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit. The entitlement of defendants is immunity from suit and not a mere defense to liability. This case, like *Siegert*, demonstrates the desirability of that approach to the claim of qualified immunity.

CONCLUSION

A heightened pleading requirement or some similar burden must be imposed on plaintiffs who seek to impose civil rights liability on public officials in their individual capacities. Otherwise the rule of qualified immunity will be converted into a rule of virtually unqualified liability on the part of these officials. The individual defendants and respondents in this case were entitled to and properly received the benefits of qualified immunity. The Petition should be denied.

Respectfully submitted,

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